MAIL DATE
8/27/03

Decision 03-08-080

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Consider the Line Extension Rules of Electric and Gas Utilities.	R.92-03-050 (Filed March 31, 1992)

ORDER CORRECTING CLERICAL ERRORS IN DECISION 03-08-078

The Commission has been informed of several formatting errors in Decision (D.) 03-08-078. Revisions to the headings under Section III Discussion and the indentation of a quotation on page 4 of D.03-08-078 have been made. No other changes have been made to this decision.

Therefore, pursuant to the authority granted in Resolution A-4661,

IT IS ORDERED that D.03-08-078 is corrected as described above.

Attached is a conformed copy of D.03-08-078.

This order is effective today.

Dated August 26, 2003 at San Francisco, California.

/s/ WILLIAM AHERN

WILLIAM AHERN
Executive Director

ATTACHMENT

L/mae

Mail Date
August 25, 2003

Decision 03-08-078 August 21, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Consider the Line Extension Rules of Electric and Gas Utilities.	Rulemaking 92-03-050 (Filed March 31, 1992)

ORDER MODIFYING DECISION (D.) 03-03-032 AND DENYING REHEARING

I. SUMMARY

This Order disposes of the application by Pacific Utility Installation, Utility Design, Inc., and Utility Service & Electric, Inc. (collectively, the "Utility Services Group" or "USG") for the rehearing of Decision (D.) 03-03-032 (the Decision), which addresses additional proposed changes to the line extension rules pertaining to the extension of gas and electric service to new customers. This Order modifies the Decision to delete Finding of Fact No. 5 and corresponding text because they are not material to the outcome of the case, modifies Ordering Paragraph No. 6 to clearly reflect the Commission's adoption of the TURN/UCAN proposal requiring the utilities to have customers submit an invoice and verified statement prior to issuing any refunds, and corrects transcription errors. Rehearing is denied in all other respects.

II. FACTS/BACKGROUND

On March 31, 1992, the Commission initiated Order Instituting Rulemaking (OIR) 92-03-050 to provide opportunities "to consolidate, simplify and standardize the extension rules, reduce the administrative costs of the rules, and more appropriately assign extension costs." (OIR, p. 1.) In Phase 1, D.94-12-026 approved changes to the utilities' main and distribution rules. An important change was to

revenue-justify the allowances provided by utilities to applicants for service (hereinafter, "applicants") in Rule 15, the main or distribution rules.[1] A second phase decision addressed applicant design and installation by establishing an applicant design test pilot program (62 CPUC2d 558 (D.95-12-013)). As the proceeding wound down, the Commission identified eight issues to be addressed in the final phase of the rulemaking (66 CPUC2d 382 (D.96-06-031).). Thereafter, annually, decisions including D.97-12-099 (77 CPUC2d 807) (which made permanent the option for an applicant to select a non-utility designer for a line extension project) and D.99-06-079 (which modified the line extension rules to reflect the deletion of Option 1 and the irrevocable option selection requirement), were issued in implementing the rulemaking. Administrative Law Judge (ALJ) Ruling of March 15, 2001 ultimately identified the final remaining issues to be addressed as: a) "free" trench inspections for applicant installations; b) the accounting for applicant design costs as on the utility's books; c) and the accounting for applicant installation costs as on the utility's books.[2]

On March 19, 2003, the Commission issued D.03-03-032 in the final phase of this OIR. This was preceded by an ALJ Draft Decision and two Commissioner Drafts, one of which was adopted as D.03-03-032. The Decision addressed additional proposed changes to the Line Extension Rules that govern the extension of gas and electric service to new customers, including changes to the utilities' line extension rules for applicant-installed projects. On April 2, 2003, Pacific Gas & Electric Company (PG&E) filed a Petition for Clarification of D.03-03-032. This is a related matter that is being handled separately from this rehearing.

On April 18, 2003, the Utility Services Group (USG) timely filed for rehearing of the Decision alleging, among other things, that the Commission's "Paragraph 2" reference is in error.[3] It also asserts that the Commission abused its

[1] The allowances determine the amount of money put up by the applicant that the utility will or will not refund.

[2] ALJ Ruling dated March 15, 2001, p. 1.

[3] Paragraph 2 is a paragraph from page 7 of D.97-12-099 (77 CPUC 2d 807, 811-812), which specified an

discretion in preventing non-utility parties from presenting evidence, and the evidence in the Decision does not support the findings. It further alleges that the Decision violates the applicant's and independent contractors' constitutional right to privacy. Finally, USG asserts that the Commission did not consider the federal and state anti-trust implications implicit in its proposal.

On May 2, 2003, San Diego Gas & Electric Company (SDG&E), Southern California Gas Company (SoCalGas), Southern California Edison (SCE), PG&E, and Southwest Gas (collectively "Joint Utility Respondents" or "JUR") timely filed a joint response, asserting that any misquotation of a prior Commission decision is not relevant or material to the issues addressed in the Decision. They argued further that USG misunderstood the scope of this phase of the proceeding. The JUR assert that the issues of whether existing accounting rules created an incentive for utilities to bid line extension jobs inaccurately and whether any changes to existing line extension accounting rules would reduce or eliminate any existing incentive for utilities to bid accurately could be fully addressed conceptually without actual cost data. As to USG's insufficiency of the evidence argument, the JUR state that there is ample evidence to support the Decision. They also disagree with USG's arguments regarding privacy and anti-trust considerations on the ground that these arguments ignore the fact that the Applicant Installation (AI) Option is voluntary, not mandatory.[4]

On May 5, 2003, The Utility Reform Network (TURN) and the Utility Consumers Action Network (UCAN) also filed a joint response to USG's application. They asserted that USG's first ground of error is merely an error in transcription that can be corrected by writing a letter to the Executive Director, pursuant to the Commission's Rules of Practice and Procedure, Rule 47(j). They agree with USG that the second and third grounds related to abuse of discretion and due process violation are grounds for rehearing because it is fundamentally unfair to prevent non-utility parties from presenting

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accounting approach for the utilities to follow when they bid on a design job.

[4] The AI Option is an alternative created by the Commission to permit applicants for service to select their own contractors to install line extension facilities rather than the utility.

evidence and then reach a conclusion on factual issues that would have been addressed by testimony stricken under an earlier ruling. However, they assert that USG's claims that the Decision violates the applicants' and independent contractors' right to privacy and fails to consider antitrust implications are procedurally defective and lacking in merit.

On July 17, 2003, USG filed a petition for writ of review (Case No. A103257) in the First Appellate District of the California Court of Appeal, Division Three. After requesting leave to amend its petition for writ of review, USG filed a formal motion pursuant to court order. [5] The date for the Commission's answer to the petition for writ of review has been extended to 30 days after the Court has ruled on the motion for leave to amend.

III. DISCUSSION

A. The Decision's Inadvertent Omission of a Portion of Paragraph 2 Is Not Legal Error.

The first allegation made by USG is that the reference to Paragraph 2 from D.97-12-099 that appears on page 9 of D.03-03-032 is in error. As the language appears in D.97-12-099, the paragraph should read:

> Additionally, we will require the utility to book to its accounts the utility's bid amount, whether the design was done by the utility or an applicant. If the utility's actual cost was more than the bid amount, the utility would write off the excess. If the cost was less than the bid, the utility would credit the difference to revenues. Also, the utility would provide the applicant with a credit equal to the utility's bid amount less any appropriate charges such as for plan checking.[6]

The Commission inadvertently omitted the third sentence, which reads: "If the cost was less than the bid, the utility would credit the difference to revenues." As

[5] Pursuant to a letter request from Petitioner to amend its petition and exhibits, on July 22, 2003, the Court ordered Petitioner to file a formal motion. On July 24, 2003, by letter, counsel for the Commission asked the Court to Hold Petition for Writ of Review in Abeyance pending the issuance of its decision on rehearing. On July 28, 2003, Petitioner filed an opposition to the request to hold the writ in abeyance. On August 4, 2003, Petitioner filed its motion to amend, pursuant to court order. Due date for the Commission's response is August 14, 2003.

USG acknowledges, the error may be a simple oversight. It also alleged, without any proof, that the omission may have formed part of the basis for the Decision. Notwithstanding the latter allegation, the omission is nothing more than a transcription error that does not rise to the level of legal error. In the interest of accuracy, we modify Paragraph 2 to include the omitted sentence. Accordingly, Paragraph 2 is so modified and shall read as designated in this Order.

B. The Commission Did Not Abuse Its Discretion Or Deny USG Due Process.

USG alleges that the Commission abused its discretion and denied it due process by preventing it from presenting evidence relevant to non-utilities, and then making findings asserting that non-utility parties did not have evidence to present. USG takes particular exception to Finding of Fact No. 5 which states: "The proponents of the USG accounting change proposal have not clearly established that a problem exists and that the proposed change is reasonably likely to mitigate or eliminate that problem." USG has taken this finding, inflated it far beyond its significance, and attempted to turn it into a violation of its constitutional rights.

USG's claim relates back to the Commission's denial of the California Building Industry Association's (CBIA) Motion to Compel responses to its data requests. The Motion sought specific cost and accounting information.**7** CBIA argued that to address the issue of whether the utilities enjoy unfair advantages under the current accounting treatment for applicant design and applicant installation, some financial

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6 *Re Line Extension Rules of Electric and Gas Utilities* (1997) 77 CPUC2d 807, 811-812.

7 The following are examples of the types of information CBIA requested from the JURs: 1) how the individual utilities establish the applicant design and applicant installation credits (both before and after D.97-12-099); 2) how the utilities arrive at determining the competitive bid price for performing installations; 3) how design services provided by/required from an applicant differ, if at all, from design services provided by the utility; 4) what hourly rates are charged by the utility when the utility collects an engineering fee from an applicant for a distribution line extension or relocation; 5) the utility's bidding procedures for applicant design and installation; and 6) differences between utility credits for applicant design and installation and the amount paid for utility administered contract design and installation work. (Motion of the California Building Industry Association to Compel Responses to Its Data Requests, Exhibit A, dated May 15, 2001.) The ALJ denied the Motion in ruling of June 27, 2001.

information is required because it is impossible to examine the impacts of the accounting mechanisms solely upon a theoretical basis.

The ALJ disagreed with this interpretation. In a ruling, the ALJ denied the Motion, stating as follows:

> For clarification, it should be explained that the real issue before the Commission is whether current utility accounting procedures should be changed so that utility shareholders are placed at risk for costs in excess of bid amounts. This is a basic accounting issue that can be fully explained on a theoretical basis. To do so, it is not necessary for CBIA to have the real-world information it seeks. CBIA can make its point through use of hypothetical numbers. For example, see JUR's Workshop Statement, Appendix A, dated April 4, 2001, which addresses this issue. The information requested by CBIA is beyond the scope of this proceeding.[8]

We agree with the ALJ that the issue, as framed above, may be addressed theoretically without burdening the record with detailed data that are not properly within the scope of this proceeding.

Finding of Fact No. 5 is not essential to the Decision. When this OIR was instituted in 1992, the Commission stated that the rulemaking was issued to consider the line extension rules of the gas and electric utilities and revisions to such rules.[9] The respondent utilities and interested parties were allowed to participate in a comprehensive review of the existing extension rules, review underlying data and policy decisions, and then propose comprehensive revisions to the existing tariffs. (*Id.*, p. 2.) Nowhere in the OIR is there a requirement that specific problems must be identified before a rules change could occur. Without regard to perceived or identified problems, the rulemaking constitutes a comprehensive effort to revamp the rules, regulations, and guidelines for a class of public utilities or of other regulated entities. (Rule 14.2; Public Utilities Code §1701.) Indeed, in a key decision, the Commission characterized the line rules

[8] ALJ Ruling on Motion of the California Building Industry Association to Compel Responses to Its Data Requests, dated June 27, 2001, p. 3.

[9] See OIR 92-03-050, *mimeo*, p. 1, 9.

changes as "changes [that] modernize the rules."[10] In a later decision, the Commission declared that the "modifications will also result in more uniform and consistent practices among the utilities." (77 CPUC2d 785, 786 (D.97-12-098).) The focus was not on individual complaints or actual data specific to individual parties. Indeed, the Decision steered clear of prejudging any issues that may be properly raised in a complaint or other forum. (See Decision, *mimeo*, p. 13, fn. 11.)

The OIR requires that "[f]or any proposed change in the extension rules, interested parties may, and respondent utilities shall, include an analysis of the seven items specified by Section 783(b)(1) through (7). (See Appendix C.)"**11** Public Utilities Code §783(b) requires that whenever the Commission investigates amending the rules or issues decisions or orders amending the rules, the proceeding should be conducted pursuant to Public Utilities Code §783(b), which requires the Commission to make findings on the following:

> (1) The economic effect of the line and service extension terms and conditions upon agriculture, residential housing, mobilehome parks, rural customers, urban customers, employment, and commercial and industrial building and development.
>
> (2) The effect of requiring new or existing customers applying for an extension to an electrical or gas corporation to provide transmission or distribution facilities for other customers who apply to receive line and service extensions in the future.
>
> (3) The effect of requiring a new or existing customer applying for an extension to an electrical or gas corporation to be responsible for the distribution of, reinforcements of, relocations of, or additions to that gas or electrical corporation.

[10] *Re Line Extension Rules of Electric and Gas Utilities* (1994) 58 CPUC2d 1, 4) (D.94-12-026).

[11] OIR, *mimeo,* p. 10.

(4) The economic effect of the terms and conditions upon projects, including redevelopments project, funded or sponsored by cities, counties, or districts.

(5) The effect of the terms and conditions upon projects, including redevelopment projects, funded or sponsored by cities, counties, or districts.

(6) The effect of the line and service extension regulations, and any modifications to them, on the consumption and conservation of energy.

(7) The extent to which there is cost-justification for a special line and service extension allowance for agriculture.

As the foregoing indicates, a specific finding that there must be a problem is not required by Public Utilities Code §783(b).

In dicta, the Decision indicated that the Commission would need a clearer indication that a problem exists and that a proposed change is reasonably likely to mitigate or eliminate the problem. (Decision, mimeo, p. 13.) This was replicated in Finding of Fact No. 5. Logically, it is reasonable to make such a statement, particularly where a party has repeatedly alleged that there are problems with current utility accounting practices. However, the Commission's statement was not linked to any legal requirement that the Commission must meet before adopting a rules change. Noting that even Section 783 is not a barrier to making reasonable changes to the line and extension rules, the Commission observed that it "clearly has the authority to adopt changes to the line and service extension rules (and, indeed, to any tariffs) if it determines that such changes better serve the general interest of California, or are consistent with other decisions of the Commission or Legislature."[12] Thus, the Commission's authority does not restrict it to rules changes only where problems exist. Since the disputed language does not reflect a legal requirement for making a change in the rules, it is not material to the outcome of the decision and should be stricken.

[12] *Re Line Extension Rules of Electric and Gas* Utilities (1997) 77 CPUC2d 785, 798 (D.97-12-098).

USG asserts that the right to offer evidence is as fundamental as the right to cross-examination. (USG Rhg. App., p. 7.) This statement was made without legal citation, and is in fact hyperbole. In a criminal context, the accused has the right to confront witnesses against him or her, pursuant to the Sixth and Fourteenth Amendments of the U.S. Constitution. However, even the right to confront a witness is not absolute.[13] Nor is the right to offer evidence. The California Supreme Court has ruled that "the presentation of a particular quantum of evidence may not be characterized as a right." (*People v. Murphy* (1972) 8 Cal.3d 349, 366.) Moreover, offering evidence, particularly without regard to whether it is relevant or material, is no guarantee that it will be received into evidence and become part of the record. The Commission neither abused its discretion nor denied USG due process.

C. USG's Sufficiency of the Evidence Claim Is Without Merit and Falls Outside the Scope of the Proceeding.

As with its due process claim, USG bases its insufficiency of the evidence argument on Finding of Fact No. 5. For the reasons discussed in the previous section, Finding of Fact No 5 is not material to the Decision, and therefore cannot be the basis of an insufficiency of the evidence claim. Furthermore, the evidence that USG seeks to offer is outside the scope of the proceeding.

The OIR laid out the background of the extension rules and set forth the scope of this proceeding. The OIR also provided that the ALJ shall issue rulings specifying the appropriate scope of comments and other issues in the rulemaking. (OIR, Ordering Paragraph No. 7.) Similarly, the ALJ was charged with issuing rulings specifying the scope of workshops. (OIR, Ordering Paragraph No. 9.) One of the final issues to be decided in this rulemaking was the accounting for line extension installation costs on the utilities' books.[14] In addressing the scope of the proceeding, the ALJ, in

[13] *People v. Smith* (2003) 30 Cal.4th 581, 609. The Court stated that if a witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial.

[14] In bringing the rulemaking to a close, the ALJ identified the following as the remaining issues: 1) "free" trench inspections for applicants installations; 2) the accounting for applicant design costs as on the utility's books; and 3) the accounting for applicant installation costs as on the utility's books. (ALJ

ruling of June 27, 2001, determined that "the real issue before the Commission is whether current utility accounting practices should be changed so that utility shareholders are placed at risk for costs in excess of bid amounts." The ALJ ruled that this is a basic accounting issue that can be fully explained on a theoretical basis. USG claims that it should have been allowed to demonstrate with detailed actual cost data that there was a problem with current utility accounting practices. We concur with the JUR that this is a rulemaking proceeding that is aimed at developing statewide standards. Individual behavior and individual statistical data are not the focus.

Some of USG's allegations may result from its misunderstanding of the differences between a public utility and a non-utility in the Commission's line extension process. For example, USG charges that the conclusions made on page 7, paragraph 3, of the Decision are unsupported. (USG Rhg. App., p. 2.) This allegation is baseless. Paragraph 3 draws distinctions, as pointed out by the JUR, between third-party installers and the utilities, and concludes that extraordinary measures to promote competition are not warranted:

> Unlike utilities, private contractors can vary the terms of their contracts, adjust their profit margin, and allow for progress payments.[15] In addition, they are not subject to being taken off a job in the event of a utility system emergency. These are all factors that help a private contractor to compete for a project. Thus, the incremental cost of inspection of applicant-installed facilities alone may not determine whether the utility or the applicant installs the facility. We are not persuaded that extraordinary measures to promote competition are warranted. (Decision, *mimeo*, pp. 7-8.)

USG also contends that the Commission's explanation of the utility's distinct function in the line extension process on page 14 of the Decision is unsupported. This too has no merit. As noted on page 14, while an applicant need only be concerned with installing the necessary facilities to serve its development, the utility is regulated,

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Ruling of March 15, 2001, p. 1.)

[15] In contrast, the utilities require up-front payment of their estimated cost less allowances before undertaking a project.

has an obligation to serve and is therefore obligated to undertake projects that third-party contractors reject, and must invest in the distribution grid. That paragraph reasonably concludes that the utilities should be allowed to recover reasonable costs, given their obligation to serve.

Finding of Fact No. 1 is also challenged by USG as being incorrect. That finding states as follows: "The utilities incur incremental inspection costs for inspecting applicant-installed facilities when the applicant performs the line extension installation." USG claims that it is incorrect because "no matter who performs the installation, all parties admit there is a cost to inspect it." (USG Rhg. App., p. 3.) There is no denying that there is a cost to performing inspections regardless of who performs them. The issue is whether there are *incremental* costs when inspections are performed by applicant installers. The Decision plainly addressed the issue as follows:

> When the utility performs the work, the utility foreman is charged with ensuring that the work conforms to all governmental and utility codes, ordinances and standards, and inspection is integrated into the construction process. On the other hand, when applicants elect to perform the work, and a non-utility contractor performs the construction, the utility has no choice but to inspect the work to ensure that the public is protected from unsafe conditions resulting from improperly installed facilities, and ratepayers are protected from the maintenance costs that would flow from defectively installed facilities.[16]

In addition, the testimony of the JUR clearly showed that there is no incremental cost of inspecting facilities that the utility installs because they inspect the facilities as they are installed.[17] Finding of Fact No. 1 is correct, and USG's contention otherwise has no basis in fact.

USG asserts that its Exhibit 104 substantiates that there is a problem with the current accounting rules, specifically that "the utilities CAN and DO book all costs to

[16] Decision, *mimeo*, pp. 5-6.

[17] See JUR Rhg. Response, p. 7, citing SDG&E's Exhibit 106 and 107, and Southern California Gas' Exhibit 109, as well as testimony by Witness Galvery.

ratebase, regardless of whether they are in excess of estimates." (USG Rhg. App., p. 10; emphasis in original.) It argues that when third parties perform line extension work, the ratepayers are not obligated to pay for anything that exceeds the allowances for line extension work, but when a utility is involved, they pay the total actual costs regardless of the allowances. As the JUR point out, it is neither remarkable nor a problem that the utilities book all costs to rate base because they are required to do so by the Uniform System of Accounts (USOA). They note further that the "utilities record actual costs to rate base for **all** utility construction projects, whether the construction project involves line extension facilities or other utility facilities, all in accordance with the USOA." (JUR Rhg. Response, p. 5; emphasis in original.)

USG claims that under D.94-12-026 (58 CPUC2d 1) and D.97-12-098 (77 CPUC2d 785), ratepayers should not pay more for the cost of designing and installing a line extension than is permitted by the line extension allowances. According to USG, this accounting practice violates D.97-12-098 and represents grounds for reversing the Decision. USG failed to cite any specific portion of D.94-12-026 or D.97-12-098 that supports its claim. Under Rule 86.1 of the Commission's Rules of Practice and Procedure, "Applicants [USG] are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention." USG's allegation failed to meet this criterion and will be treated accordingly. Moreover, the decisions did address the amount of line extension allowances, but they did not address whether the utilities should be limited to booking only the amount of the line extension allowances to rate base.

In D.94-12-026, the Commission was also faced with respondents who attempted to address matters outside the scope of the proceeding. In denying Cogeneration Service Bureau's (CSB) motion that transmission lines be considered in this proceeding, the Commission responded:

> Further, we are not persuaded that PU Code §783 requires the Commission to address any matter that is outside the scope of this proceeding. If that is so, there would be no limit to the

> scope of this proceeding and there would be no hope of concluding this proceeding within a reasonable time.[18]

Consistent with this pronouncement of nearly a decade ago, we will refrain from addressing matters outside the scope of this proceeding.

D. The Commission Did Not Violate USG's Right to Privacy.

USG objects to the Decision's requirement that when customers use third-party installers for line extensions, they must submit an invoice and verified statement prior to receiving refunds from the utility.[19] USG claims that such a requirement violates state privacy protections. It specifically charges that this requirement is an invasion of the private contract terms between the applicants for service and their contractors, and is a violation of the California Constitution, Art. 1, §1. USG's argument is baseless.

The right to privacy is not absolute, as USG reluctantly concedes. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37; *People v.* Hall (2002) 101 Cal.App.4th 1009, 1023.) In *Hill, supra*, at 35-37, the California Supreme Court held that a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: 1) a legally protected privacy interest; 2) a reasonable expectation of privacy in the circumstances; and 3) conduct by the defendant constituting a serious invasion of privacy. The Court stated further that a defendant may prevail in a state constitutional privacy case by negating any of the three elements above, or by pleading and proving that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. (*Hill, supra*, p. 40.)

USG has not demonstrated that it has a legally protected privacy interest. The three businesses comprising USG are California corporations that perform utility engineering and utility construction services for private real estate developers,

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[18] *Re Line Extension Rules of Electric and Gas Utilities* (1994) 58 CPUC2d 1. A similar response was made to Western Mobilehome Parkowners Association's position that utilities should not be permitted to install centrally located meters and yard lines in mobilehome parks without the written consent of the park owner. (*Id.*, p. 13.)

[19] This is the TURN/UCAN proposal, which the Commission adopted because it provides an opportunity for cost savings without creating any new ratepayer risk or causing the utilities to undertake any new unrecoverable expenses. This requirement appears on page 17, Paragraph 2, of the Decision. Ordering Paragraph No. 6 has been modified to clearly reflect the Commission's adoption of this proposal.

homebuilders, and municipalities in California.[20] It is not the disclosure of USG's financial data that is at risk here; rather, it is the cost information of the developers, for which USG performs services, whose alleged disclosure USG complains of. USG is not a developer and does not have standing to raise the issue. Therefore, USG's claim that "[f]orcing applicants to disclose their contractor costs" invades the right to privacy is without merit. (USG Rhg. App., p. 14.) Furthermore, the Decision does not dictate which entity applicants for service must use to do the line extensions. Rather, by means of the AI option, they have a choice. Should they exercise the choice of not using a utility, if they wish to be reimbursed for third party billing costs, they must submit an invoice and verified statement.

We need not go further with the analysis since USG would not be able to satisfy all elements, as required by *Hill*. Nevertheless, as to the second element of having a reasonable expectation of privacy, USG still falls short. The extent to which an entity has voluntarily entered into the public sphere may be relevant in determining the protection to be afforded his privacy. (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 36.) USG voluntarily injected itself into the public arena by pursuing the opportunity to perform line extension work normally performed by public utilities. If USG wishes to participate, it must follow the rules established by the Commission.

E. USG Has Not Demonstrated that the Commission Violated Federal and State Anti-Trust Laws.

USG alleges that the Commission failed to consider the federal and state anti-trust implications implicit in permitting the utilities to have access to the applicants' cost information, claiming that it is "common sense" that your competitor has an advantage over you if it has access to the *prices* you charge your clients. (USG Rhg. App., p. 15; emphasis added.) As an initial matter, it appears that USG is confusing "prices" with "costs" or, at the very least, it is using the terms interchangeably. For

[20] Petitioners Pacific Utility Installation and Utility Service & Electric are gas and electric utility installation contractors that compete with the utilities to install gas and electric line extensions. Petitioner Utility Design, Inc. is a registered civil engineering firm that competes with utilities to design gas and electric line extensions in California.

example, USG objects to the disclosure of independent contractor *costs*, arguing that the Commission should not force "non-regulated applicants to disclose their private information concerning the costs their independent contractors charge." (*Id.*) In any event, USG's "common sense" assertion does not substantiate its anti-trust claims.

USG points to what federal and state courts purportedly require without analyzing the cases and their possible application to the facts before us. Its assertion that federal courts require regulatory commissions to take anti-trust considerations into account in determining whether a contemplated action will advance the public interest was accompanied by a case with the incorrect citation.[21] USG also relied on *Northern California Power Agency v. Pub. Util. Comm.* (1971) 5 Cal.3d 370, a case that is inapposite to these facts. That case revolved around Pacific Gas & Electric's ex parte application for a certificate of public convenience and necessity (CPC&N). The excerpt cited by USG that the Commission should consider anti-trust implications "in reaching a decision to grant or deny a certificate of public convenience and necessity" is not relevant to these facts. (USG Rhg. App., p. 15, citing *Northern California Power Agency*, p. 377.) Requiring an applicant for service to provide proof of the charges made by independent contractors before obtaining a refund from the utility is entirely reasonable, and in no way compares to any potential monopolistic concerns that could occur when a CPC&N to provide service to specifically designated areas is issued.

Additionally, in *Northern California Power Agency*, the company argued at the outset that state and federal antitrust laws were violated, and thus the CPC&N should not be granted unless the contracts were renegotiated to remove their monopolistic features. In contrast, anti-trust issues are being raised for the first time in USG's rehearing application, although, as TURN and UCAN observe, the facts that spawned the allegation have been "on the table and actively debated for a number of years in this proceeding." (TURN & UCAN Rhg. Response, p. 5.) USG's anti-trust allegation may well be "nothing more than an afterthought" as TURN and UCAN say it was. (*Id.)*

[21] *California v. Fed. Power Comm'n* is not found at 369 U.S. 905, and it is not incumbent upon the Commission to ascertain which authority USG is referencing.

Significantly, the aspect of *Northern California Power Agency* that has special application to these facts is the California Supreme Court's acknowledgment that regulatory agencies are not bound by the dictates of the antitrust laws, "for they can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance."[22] However, USG neglected to point that out. Assuming, for the sake of argument, that the Court found the Commission's action violated anti-trust policy, it would likely find that other considerations were overriding, e.g., implementing accounting changes that appropriately assign line extension costs so that amounts booked to ratebase from applicant-performed work inures to the benefit of ratepayers, while simultaneously encouraging others to compete to provide line extension service to new customers.

IV. CONCLUSION

We grant limited rehearing to delete Finding of Fact No. 5 and corresponding text in the Decision on the grounds that they are not material. In addition, Ordering Paragraph No. 6 is modified to reflect the Commission's adoption of the TURN/UCAN proposal requiring customers to submit an invoice and verified statement prior to the utility issuing a refund. A transcription error on page 9 that recites a passage from D.97-12-099 (Paragraph 2) is also corrected, as well as a clerical error citing the number of a Commission decision. We deny rehearing in all other respects.

Therefore, **IT IS ORDERED** that**:**

1. D.03-03-032 is modified as follows:

   a) Page 7, first full paragraph, last sentence, the first decision referred to should be "D.85-08-043," not D.85-08-045.

   b) Page 9, first paragraph under Section V, Accounting Issues, the indented quotation should read as follows:

   Additionally, we will require the utility to book to its accounts the utility's bid amount, whether the design was done by the utility or an applicant. If the utility's actual cost was more than the bid amount,

[22] *Northern California Power Agency, supra* at 377.

the utility would write off the excess. If the cost was less than the bid, the utility would credit the difference to revenues. Also, the utility would provide the applicant with a credit equal to the utility's bid amount less any appropriate charges such as for plan checking.

c) Page 13, first paragraph, is modified as follows:

From the perspective of a private contractor that is hoping to capture some of this work, these theoretical incentives could be cause for concern. When theory becomes reality, the private contractor may avail itself of the mechanisms that the Commission has in place for parties to challenge unreasonable disparities between estimates and costs for utility-installed projects. [Footnote included.] We are not persuaded that the USG proposal, however well-intended, would lead to more accurate utility estimates.

d) Page 13, second paragraph, last sentence, which reads: "We would first need a clearer indication that a problem exists and that a proposed change is reasonably likely to mitigate or eliminate that problem" is deleted.

e) Finding of Fact No. 5 is deleted.

f) Modify Ordering Paragraph No. 6 to read as follows:

Within 30 days, Pacific Gas and Electric Company, San Diego Gas and Electric, Southern California Edison Company, Southern California Gas Company and Southwest Gas Company shall file advice letters proposing any tariff changes necessary to implement the changes adopted in this order, including, but not limited to, the Commission's adoption of the TURN/UCAN proposal mandating that the utilities require the customer to submit an invoice and verified statement prior to issuing any refunds. The advise letters shall be filed in accordance with General Order 96-A and subject to further order of the Commission.

2. The application of USG for the rehearing of D.03-03-032, as modified, is denied.

This order is effective today.

Dated August 21, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners